EXHIBIT J

ORIGINAL

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San Francisco County Superior Court
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO, UNLIMITED CIVIL JURISDICTION

MICHAEL DIPIRRO,

Plaintiff,

v.

J.C. PENNEY COMPANY, INC.; AND DOES 1 through 150, inclusive

Defendants.

Case No. 407150
(Consolidated with Case No. 407458)

Honorable A. James Robertson

TRIAL DEPT: 503

~~[PROPOSED]~~ STATEMENT OF DECISION Liability Phase
(California Rule Of Court 232)

MICHAEL DIPIRRO,

Plaintiff,

v.

MACY'S; AND DOES 1 through 150,

Defendants.

STATEMENT OF THE CASE

I. DESCRIPTION OF TRIAL

On July 28, 2003, trial in the above-entitled matter commenced before the Honorable A. James Robertson II, sitting without a jury. Gregory M. Sheffer, Esq. and Clifford A. Chanler of Sheffer & Chanler LLP appeared for Plaintiff Michael DiPirro, and Jeffrey B. Margulies, Esq. and Rachel D. Stanger, Esq. of Parker, Milliken, Clark, O'Hara & Samuelian appeared for Defendants J.C. Penney Company, Inc. (hereafter "J.C. Penney") and Macy's West, Inc. (hereinafter "Macy's West"). Mary Harokopus, Esq. appeared pro hac vice for J.C. Penney. On September 8, 2003, Ann M. McGrath, Esq. of Parker, Milliken, Clark, O'Hara & Samuelian also appeared on behalf of Defendants.

The court trial lasted for 72 days. Opening statements were given on July 30, 2003. Presentation of Plaintiff's evidence was given on July 31 - August 21, 2003. Presentation of Defendants' evidence was given on August 26, September 8 - November 13, 2003. Plaintiff presented rebuttal evidence and closing arguments were made in court starting on November 18 through December 2, 2003. Thereafter, the parties submitted further written and oral argument at the Court's request by telephone on December 11 and 18, 2003. Further briefs and proposed statements of decision were submitted by the parties pursuant to a schedule established by the Court. The Court required written comments by each party directed to the submissions of the other party. The Court held a number of telephonic conference hearings concerning these matters in which there were further arguments. The matter was submitted for decision on April 28, 2004. A total of twenty-three witnesses testified at trial between July 31, 2003 and November 10, 2003. The Plaintiff presented eight witnesses during trial, which included two investigators,[1] one laboratory technician,[2] three experts,[3] one glassware manufacturer representative[4] and in-house counsel for J.C. Penney, Mary Harokopus.

[1] Russell Brimer, Dea Services investigator and Bernice Dea, owner of Dea Services.

[2] Hugh Dennis Dougherty, laboratory technician for Curtis & Tompkins laboratory.

The Defendants presented sixteen witnesses, which included five buyers,[5] one glassware manufacturing representative,[6] one testing witness,[7] one cosmetic usage witness,[8] three in-house counsel witnesses,[9] four experts,[10] and the Plaintiff, Michael DiPirro.

In addition, during the course of trial, both Plaintiff and Defendants each brought a Motion For Judgment under C.C.P. 631.8. The Court declined to rule on both motions until submission of the case. Plaintiff also brought three motions to exclude witnesses Richard Brinkman, Christine Parker, Owen Jones and other percipient witnesses of each Defendant and two motions for sanctions based upon Defendants alleged failure to provide information regarding "knowledge" and failure to identify products. All such motions were denied due to a failure to demonstrate knowing violation of a prior court order. In addition, Plaintiff served trial discovery on Defendants in the form of special interrogatories and requests for production. Defendants objected to the discovery as untimely and improper. On July 30, 2003, the Court considered the objections and ruled that Defendants were only required to answer select, modified special interrogatories and requests for production.

During the trial, Plaintiff introduced 209 exhibits and Defendants introduced 218 exhibits.

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[3] Dr. David Robert Brown, toxicology expert; Michael Mazis, advertising and marketing expert; Dr. Barbara Callahan, toxicology expert.

[4] Soleiman Gabay, President of Gibson Overseas, Inc.

[5] Elizabeth Morello, Senior Vice President and General Merchandise Manager, Fragrances and Cosmetics for Macy's West; Jill Barr, buyer of cosmetics for Macy's West; Judy Strother, administrative assistant in the Tabletop division of J.C. Penney; Richard Brinkman, former Senior Buyer in the Tabletop Division of J.C. Penney; Christine Parker, Senior Buyer of cosmetics for J.C. Penney.

[6] Wayne Zitkus, manager of international business development for Libbey, Inc., manufacturer of painted glassware.

[7] Owen Jones, former Product Safety Coordinator for the Retail Testing Laboratory at J.C. Penney.

[8] John Voda, Director of Research at Pragmatic Research responsible for the CTFA study regarding cosmetic usage.

[9] Christine Brandt, in-house counsel for Macy's West; Mary Harokopus, in-house counsel for J.C. Penney; Susan Witt, paralegal for J.C. Penney.

[10] Dr. Carla Kagel, analytical chemistry expert; Dr. Michael Lakin, toxicology expert; Dr. James Embree, toxicology expert; Dr. Wayne Stewart, false advertising expert.

The parties stipulated and agreed that, should it be necessary to decide any issues concerning remedy, those issues would be bifurcated for separate trial after a decision is reached on the liability phase of the case. Pursuant to this stipulation, the Court ordered the case bifurcated.

II. SUMMARY OF STATEMENT OF DECISION

For the reasons set forth in this tentative decision, the Court finds as follows:

1. Plaintiff has proved that J.C. Penney and Macy's West caused exposures to lead (a chemical listed pursuant to the Health and Safety Code) through their sale of cosmetic products and further finds that J.C. Penney caused exposure to lead through their sale of painted glassware.

2. With respect to the sale of the cosmetic products, the Court finds that J.C. Penney and Macy's West did not knowingly cause any exposure to lead in cosmetics with the sale of such product because they were unaware such products contained lead. Accordingly, the Court finds J.C. Penney and Macy's West have no liability for the sale of such products under the Health and Safety Code. In connection with this finding of no liability, the Court did determine that the notice issued by Plaintiff gave Plaintiff standing so that the Court could make its finding of non-liability. The Court further concluded that the doctrine of estoppel does not foreclose Plaintiff for asserting claims as to cosmetic products.

3. With respect to painted glassware, the Court finds that J.C. Penney knowingly caused an exposure to lead by selling glassware painted with lead paint because J.C. Penney was aware the paint on the exterior of the glasses contained lead and J.C. Penney was aware customers would touch the lead paint in the normal course of drinking from the glasses. Accordingly Plaintiff has established liability for a knowing exposure. Since the glassware was intentionally sold and not accidentally distributed, the Court finds that J.C. Penney acted intentionally in exposing customers to the lead in the glassware. Therefore, J.C. Penney is liable for any sale of such glassware as may have occurred. In making this finding, the Court concludes Plaintiff's notice was sufficient to

confer standing and Plaintiff was not estopped because of failure to identify the glassware products at issue.

4. Regarding the affirmative defense of exemption, the Court finds that in the case of the sale of cosmetics both J.C. Penney and Macy's West have sustained their burden and have established that the amount of exposure to lead fell below the allowable exemption level.

5. With respect to the painted glassware, the Court finds that J.C. Penney failed in its attempt to show that the exposure from the glassware fell below the exemption level because, inter alia, J.C. Penney did not show by competent evidence the amount of lead which would be transferred into a customer's mouth through the normal use of the glassware.

6. The Court concludes that Plaintiff has failed to establish any liability on the part of Macy's West or J.C. Penney for false advertising under Business and Professions Code § 17500 for cosmetic products or painted glassware because their actions in advertising or selling the products were not false or misleading.

III. STATEMENT OF FACTS

A. Statement of Facts Concerning Plaintiff and Testing

1. Plaintiff Michael DiPirro's Complaints in this Consolidated Action

Plaintiff Michael DiPirro initiated this consolidated action with the service of three separate 60-Day Notices of Violation pursuant to Proposition 65. On October 11, 2000, DiPirro served Defendant J.C. Penney with a 60-Day Notice of Violation for J.C. Penney's sale of cosmetic kits containing lead and/or lead compounds. (*See*, Trial Ex. 92). On November 20, 2001, DiPirro served Defendant Macy's West with a 60-Day Notice of Violation for Macy's West's sale of cosmetic kits containing lead and/or lead compounds. (*See*, Trial Ex. 91). On December 31, 2001, DiPirro served J.C. Penney with a second 60-Day Notice for J.C. Penney's sale of painted glassware (with paint containing lead). (*See*, Trial Ex. 92).

On April 25, 2002, DiPirro filed and served his Complaint against Defendant J.C. Penney. The J.C. Penney Complaint included three causes of action: (1) for J.C. Penney's alleged past and continuing violation of Proposition 65 by its knowing and intentional sale, without a clear and reasonable warning, of cosmetic kits with components containing the toxin, lead, and of externally painted glassware with paint containing lead (the normal and reasonably foreseeable use of each of which caused unlawful consumer exposures to lead); (2) for J.C. Penney's alleged past and continuing violations of Business and Professions (B&P) Code § 17200 by engaging in the unfair business practice of selling cosmetic kits and painted glassware in violation of Proposition 65; and (3) for J.C. Penney's alleged past and continuing violation of B&P Code § 17500 from its creation, approval and/or dissemination of a deceptive and misleading marketing scheme for cosmetic kits and painted glassware consequent to the failure to either identify the presence of the toxin, lead, or include the required clear and reasonable warning of reproductive toxicity from the products' lead content.

On May 2, 2002, DiPirro filed his Complaint against Defendant Macy's West and served it upon Macy's West on May 10, 2002. The Macy's West Complaint contained the same three legal causes of action as in the J.C. Penney Complaint but *only* in relation to Macy's West's alleged sale, without a Proposition 65 warning or identification of the presence of lead, of cosmetic kits with components containing the toxin, lead.

2. Background of Plaintiff Michael DiPirro

Plaintiff Michael DiPirro is a citizen enforcer of the California Health and Safety Code § 25249.7(d) ("Proposition 65"), who is concerned with consumer exposures to lead and other hazardous substances. Mr. DiPirro has a history of successful enforcement of Proposition 65 and the Business & Professions Code (§§17200, 17500) against retailers and manufacturers of a wide spectrum of consumer products. Mr. DiPirro waives his own right to monetary civil penalties in exchange for enhanced injunctive relief such as product reformulation or improved warning commitments.

3. Testing Methodologies Utilized

Lead is a metal in its simplest form and may combine with other chemicals to form lead compounds. Lead and lead compounds, all of which serve no beneficial purpose for the human body, are known to be reproductive toxicants. Lead and lead compounds can be found in the air, water and soil of our environment as well as in certain consumer products. Lead is added to some consumer products to enhance the brightness and tone of colors or pigments found in the product, such as the painted decoration on glassware.

Lead can be identified in consumer products by digesting portions of the product itself (EPA 3050, 21 CFR 1303), digesting approved wiping materials that pick up the available lead from the surface of consumer products (NIOSH 9100) or bathing the product in a mild acid solution that will collect the lead that leaches to the surface of products (ASTM C 927, ASTM C 738). Each of these methods is generally referred to as being a "method of preparation" of the product sample. All three types of lead collection result in the lead being contained in a liquid solution, a portion (aliquot) of which is then analyzed for the concentration of lead collected from the product. The concentration is generally reported in units of micrograms of lead. The method of analysis of the liquid samples can be performed by either atomic absorption spectrometry (AES) or mass spectrometry (MS) – both performed using inductively coupled plasma (ICP) to break down the sample into its elemental form.

The ICP-AES method utilized in this trial is detailed by **EPA Method 6010**. ICP-AES technology has been in use since the 1970s and is currently an important method of analyzing samples for their elemental properties. ICP-AES technology involves an aliquot of the subject solution being pumped into a machine that nebulizes the solution into an aerosol, pushing the solution up a quartz chamber until the solution comes into contact with a plasma torch. A stream of argon that has been superheated to 10,000 degrees centigrade breaks down the constituents in the solution into their elemental form, promotes the atoms into high energy levels and then allows the machine to read the light emitted from electron fields as they "calm" back down to their lower levels. The

wavelength and intensity of the light discharged from the manipulated atoms will allow their elemental identification.

The ICP-MS method presented in this trial is detailed by **EPA Method 6020**. ICP-MS technology is similar to the AES method of analysis except it uses the ICP as an ion source. With ICP-MS, the solution is bombarded with an electron beam to fragment the molecule. The positive fragments are bent by magnetic forces and sorted on the basis of mass-to-charge ratio. This ratio and its intensity are analyzed to produce the equivalent of the molecular weight of the fragment and its elemental identity.

The specific method of sample preparation used in this trial to digest cosmetic and paint chip samples is **EPA Method 3050B**. This method involves the acid digestion of materials containing lead (or other chemicals) for analysis by either ICP-AES or ICP-MS. Generally, the preparation includes a 1 to 2 gram portion of the sample being dissolved using a combination of hydrogen peroxide, nitric acid, hydrochloric acid and heat to identify elements that could become "environmentally available". By definition, it is not a total digestion of all elements and will not break down elements bound within silicate structures.[11] Any resulting concentration analysis is reported in units of milligrams of lead per kilograms of sample (mg/kg) or the equivalent measure of micrograms per gram (μg/g). The concentration is calculated relative to the total weight of the sample introduced into the digestion process, not the portion of such sample ultimately digested. (Dougherty Test. 8/11.) The EPA Method 3050 was identified by Mr. Dougherty as the standard test adopted/accepted by the Federal government to test for the presence of lead in solids. (Dougherty Test. 8/11.)

EPA Method 3050B does not distinguish among elemental lead, organic lead, and inorganic lead, as the superheated acid digestion reduces all lead compounds that are environmentally available to elemental lead atoms. The conditions under which the

[11] EPA Method 3052 is recommended if a complete, total identification of lead content is desired or required.

3050B acid digestion of cosmetic samples occurs are not similar to the conditions on the skin or in the stomach of the users.

Testimony of J.C. Penney witnesses and their documents also referenced a direct paint digestion procedure implemented by J.C. Penney (and its vendors) under ASTM D3335-85a (1999) for compliance with **16 CFR 1303**. This procedure digests actual chip samples of lead-containing paint by acid and heat digestion for analysis by ICP-AES. This procedure is similar to the EPA 3050B/6010 method of preparation and analysis for lead content. Under this method, the concentration of lead, and lead compounds, in paint is analyzed by the weight of dissolved elemental lead compared to the weight of the paint from which it was dissolved. Under the Federal mandate of 16 CFR 1303, the concentration of lead in paint on products falling within the scope of the regulation may be no more than .06% of the paint or it will be considered a banned hazardous substance on a national basis. On April 9, 2002, the CPSC responded to a FOIA request from Plaintiff's attorneys and attached a draft procedure for testing consumer products suspected of containing lead. Both the CPSC's draft providing for this test and the CPSC's proposed test for testing lead content of children's products provide for testing lead on decorated glassware products by scraping the decoration off and digesting it. (Ex. 136.) This method was also utilized by Mr. Wise, an evaluator of glassware products for JC Penney's Research Testing Laboratory to digest lead-containing paint chips taken directly from some of its glassware. (Exs. 51-57.) Mr. Wise expressed the results in a percentage concentration factor. He then compared the results to either the .06% standard for National sales or a .01% standard for California Proposition 65 requirements.

One specific method of sample preparation utilized to identify the amount of lead on the surface of the glassware products was the **NIOSH 9100** wipe procedure. (*See*, Trial Ex. 179 (NIOSH Publication No 98-112, p. 2).) This method involves the removal of lead from the surface of an object - a painted glassware surface in this case – by wiping the surface with a moistened cellulose esther filter paper. The glassware surface is wiped in a vertical s-pattern, the exposed filter is folded and the glassware surface is wiped in a

horizontal s-pattern and then the filter is folded one more time and the vertical s-pattern wiping is repeated. The exposed filter is then placed into a beaker and dissolved, using a combination of heat, hydrogen peroxide and hydrochloric acid. The resulting solution is then analyzed by ICP-AES/EPA 6010B for lead content and the result is reported in total micrograms of lead per wipe sample.

The **NIOSH 9100** wipe method of analysis is used to identify lead on the surface of an object. (Ex. 104, Ex. 179.) In draft CPSC regulations for testing lead exposure to consumer products, the wipe method is adopted for the specific purpose of analyzing the "available lead on the surface" of decorated glassware products. (Ex. 136). The test is utilized extensively for surface lead identification and analysis at State and Federal waste cleanup sites. (Brown and Callahan Test.) Dr. Brown relied upon this test as the basis for performing lead analysis for both the State of Connecticut and the ASTDR. (*See*, Brown Test. 8/7). The CPSC also used a wipe test for analysis of available lead or other toxins on the surfaces of materials in connection with the PVC toys, miniblinds and copper chromated arsenic treated playground equipment studies. (Ex. 135, pg. 4.) Further, defense expert Dr. Embree and industry representative Wayne Zitkus have both employed the wipe method.

Similarly, lead on the painted surface of the glassware was also measured by a 24 hour leaching test under the **ASTM C927** method of preparation. The ASTM C927 test calls for placing the glassware upside down in a beaker to which a mild acid solution is added. Dr. Brown testified that the level of acidity of the weak acid solution is similar to products such as Coke, coffee or wine. (Brown Test 8/7.) The beaker is covered and the glass is left to sit in the bath for a 24 hour period, though most of the transfer of lead occurs during the first few hours. (*See*, Brown Test. 8/7; *See also*, Dougherty Test. 8/11.) At the end of this period, an aliquot of the solution is withdrawn and analyzed, by ICP-AES/EPA 6010B, for the amount of lead that leached into the solution from the glass. The resulting concentration of lead recovered is reported in terms of parts per million. This particular test (C927) was designed by the glassware industry and later 'endorsed' by

the FDA as a voluntary Federal "quality control program to ensure adequate protection of consumers from exposure to lead from decorated glassware." This method is a "severe test that is unlikely to be matched under the actual condition of use" of glassware. (Exh. C, §1.) However, "[e]ven though the amount of lead and cadmium extracted by this test method is in no way representative of the amount of metals extracted by actual lip contact, the relative magnitude of the metals extracted from one test specimen in relation to another test specimen provides an effective tool for discrimination." (Exh C. §5.) J.C. Penney, itself, agrees that, "[a]ny and all types of these glasses should be reviewed towards ASTM C927 Lip and Rim for assurance towards conformity and not assumed." (Trial Ex. 100, p. 1212, 1238.)

4. Lead Content in the Products

Plaintiff proved there is lead in each of the products tested. Dennis Dougherty, an analytical chemist for the last twenty years, specifically tested certain of Defendants' glassware and cosmetic products for the presence of lead and achieved results demonstrating the presence of metallic lead in each of the samples submitted by Plaintiff. Mr. Dougherty performed the chemical analyses at Curtis & Tompkins ("C&T"), a scientific laboratory where he has worked as an analytical chemist for the last seventeen years. C&T, in business since 1878 and the second oldest independent lab in the U.S., has achieved both State and Federal certification as an analytical laboratory in the methods and equipment used in the testing for Plaintiff. Accredited specifically by both the United States Navy and the United States Army Corp of Engineers, C&T is the primary quality assurance/quality control (QAQC) lab for the Army Corp of Engineers. C&T enjoys extensive experience analyzing materials for lead as well as utilizing each of the test methods employed by Plaintiff in this case. Based upon his performance of the analytical chemistry, identified above, on the products at issue, Mr. Dougherty testified that the tests he performed identified available lead removed from the glassware. He not only testified that lead was "detectable" in the painted glassware and cosmetic products at issue, he also confirmed it was actually detected in samples of glassware and cosmetic kit components

that he tested. Mr. Dougherty did not utilize a test capable of speciating the specific lead compounds, if any, from which the detected lead resulted.

Mr. Dougherty testified that, based upon the chain of custody and preparation procedures he personally directed or observed, there was no identified potential for contamination, with lead from any other source, for any of the products tested at the lab with lead from any other source. Mr. Dougherty also testified that other methods of preparation existed for the analysis of the lead content of cosmetics. He identified that a microwave digestion procedure, under EPA 3052, would have been more aggressive than the 3050 method and would have yielded a cosmetic lead concentration figure more closely representing the actual concentration, potentially including some lead that was not "environmentally available".

Bernice Dea testified that Plaintiff's counsel were responsible for how the samples were collected, products were tested, and results were interpreted. Counsel directed Ms. Dea and her investigators to purchase particular pre-selected cosmetic and painted glassware products. There was no sampling plan for any of the products that were tested, and no expert oversight over the collection of products for testing or the manner in which they would be tested. Counsel directed Ms. Dea to send certain samples to the laboratory for testing. Counsel chose which tests would be performed and how those tests would be modified. Counsel's paralegal transmitted the samples and testing instructions to the lab, under Ms. Dea's direction. Counsel then told Ms. Dea which test results to send to Drs. Brown and Callahan for their review.

a. J.C. Penney's Painted Glassware Products

Plaintiff purchased painted glassware products sold by J.C. Penney and tested samples of each product purchased for lead. Plaintiff conducted several series of tests using the NIOSH 9100 wipe test, the ASTM C927 Lip & Rim Test, the NIOSH 3050 digest test and the NIOSH 9100 wash-wait-wipe test.

Between November 20, 2002 and December 13, 2002, Plaintiff conducted a series of tests using the NIOSH 9100 wipe test. The NIOSH 9100 wipe test is the equivalent of

a single consumer contact with the product. It is not the equivalent of repeated contacts with the product surface. During this series of tests, Plaintiff tested Certified International products including the Sunrise Goblet with test results of 9.1 µg of lead per wipe, the Flora Goblet with test results of 8.5 µg of lead and Midnight Christmas with test results of 9 µg of lead. In all of the NIOSH 9100 wipe tests conducted by Plaintiff before trial, the glasses were not washed before they were wiped.

On April 24, 2003, April 29, 2003 and April 30, 2003, Plaintiff conducted three series of tests using the ASTM C927 Lip & Rim test. The ASTM C927 test provides results in µg of lead per milliliter of solution, total µg of lead and parts per million (ppm) relative to the internal volume of the glass.

During this series of Lip & Rim tests, at a submerge depth of 76 mm, Plaintiff tested Gibson Overseas Crazy Daisy glassware and received test results of 75 and 137.9 ppm of lead. Also at a submerge depth of 76 mm, Plaintiff tested Gibson Overseas Tropical Delight glassware and received test results of 155.2 and 198.3 ppm of lead.

Plaintiff performed a C927 test on JC Penney Home Collection Glass Ice Tea (Granco) glassware, at a submerge depth of 38 mm, and received results of 210 and 308 ppm of lead.

Plaintiff tested Home Essentials & Beyond glassware, at a submerge depth of 50 mm, and achieved results of 33.3 and 57.8 ppm of lead for Country Garden and results of 306.2 and 366.7 ppm of lead for Golden Orchard. Plaintiff also tested Home Essentials & Beyond glassware at a submerge depth of 63 mm, and achieved results of 83.3 and 114.8 ppm of lead for Flamingo Wine and results of 195.6 ppm of lead for Vintage Wine.

Plaintiff tested Libbey's Orchard Fruit, at a submerge depth of 50 mm, resulting in .1 to .3 ppm of lead.

During this series of tests, at a submerge depth of 20 mm, Plaintiff also tested Block/Salton's Jonal Hudson Valley glassware with results ranging from 80 to 118.9 ppm of lead.

Finally, Plaintiff tested Certified International glassware, at a submerge depth of 20 mm, and achieved results of 6.3, 13, 15.8 and 23 ppm of lead for the Flora Goblet and results of 11.4, 15, 16.25, 16.9, 29.9 and 52.3 ppm of lead for the Sunrise Goblet.

On April 25, 2003, Plaintiff performed a second series of NIOSH 9100 wipe tests. During this series of tests, Plaintiff tested Block/Salton's Jonal Hudson Valley glassware and received results of 0.7 µg, 1.1 µg, 5.2 µg and 5.6 µg of lead. Plaintiff also tested Gibson's Crazy Daisy glassware in this series and received test results ranging from 5.7 to 27 µg of lead. Testing Gibson's Elite Tropical Delight glassware, Plaintiff received test results from 4.6 to 12 µg of lead. Plaintiff tested JCP Home Collection Glass Ice Tea (Granco) glassware and received results of 4.2 and 5.2 µg of lead. Plaintiff also tested Home Essentials & Beyond products, including Flamingo Wine glassware with test results of 2.0 and 2.7 µg of lead and Golden Orchard glassware with results of 3 and 3.4 µg of lead. During this series of tests, Plaintiff also tested Libbey's Orchard Fruit glassware and received results of 1 and 1.9 µg of lead.

On July 14, 2003, and August 14, 2003, Plaintiff conducted a series of EPA 3050 digest tests. These tests demonstrate the concentration of lead in the paint itself. The results are reported in parts per million (or µg/gram or mg/kg).

In this series, Plaintiff tested Certified International glassware products, including Midnight Christmas glass with results of 130,000 mg/kg (13%) and Floral Tapestry with results of 340,000 mg/kg (34%) of lead. Plaintiff tested Block/ Salton's Jonal Hudson Valley glassware and received results of 570,000 mg/kg (57%) of lead. Plaintiff tested Gibson's Crazy Daisy glassware and received results of 390,000 mg/kg (39%) of lead. Plaintiff tested JCP Home Collection Glass Ice Tea (Granco) and received results of 250,000 mg/kg (25%) of lead. Plaintiff tested Home Essential & Beyond's Country Garden and received results of 360,000 mg/kg (36%) of lead. Lastly, in this series of tests, Plaintiff tested Libbey's Orchard Fruit and received results of 450,000 mg/kg (45%) of lead.

On August 22, 2003, Plaintiff conducted a series of NIOSH 9100 wash-wait-wipe tests. During this series of tests, the glassware products were first washed according to the guidelines set forth in C927 Lip and Rim tests. The products were allowed to dry and then one half of the exterior of the glassware would be wiped at varying periods of recorded time (e.g. 0 hours, 24 hours, 48 hours or 96 hours). At each of the times recorded, Plaintiff performed the NIOSH 9100 wipe method of sampling using only 3 strokes.

In this series of tests, Plaintiff tested Block/Salton's Jonal Hudson Valley glassware with test results of 9.2 and 16 µg when wiped at 0 hours, 4.8 µg at 24 hours, between 30 and 81 µg at 48 hours, and from 6.8 to 160 µg at 96 hours. Plaintiff also tested Certified International products including Floral Goblet and Floral Tapestry. The test results for the Floral Goblet were 1.9 and 5.8 µg when wiped at 0 hours, 38 µg at 24 hours, from 9.7 to 32 µg at 48 hours, and from 150 to 320 µg at 96 hours. The test results for the Floral Tapestry Goblet were .89 and 2.9 µg when wiped at 0 hours, 40 µg at 24 hours, from 7.3 to 67 µg at 48 hours, and from 120 to 150 µg at 96 hours. Plaintiff tested Gibson's Crazy Daisy glassware and received test results of 1.9 and 2.6 µg when wiped at 0 hours, 53 µg at 24 hours, from 53 to 77 µg at 48 hours, and from 21 to 47 µg at 96 hours. Plaintiff tested JCP Home Collection Glass Ice Tea (Granco) glassware and received test results of 4.4 and 4.9 µg when wiped at 0 hours, 32 µg at 24 hours, from 26 to 71 µg at 48 hours, and from 200 to 230 µg at 96 hours. Plaintiff tested Home Essentials & Beyond Country Garden glassware and received test results of 3.5 and 4.3 µg when wiped at 0 hours, 22 µg at 24 hours, from 19 to 63 µg at 48 hours, and from 13 to 18 µg at 96 hours. Lastly, in this series of tests, Plaintiff tested Libbey Orchard Fruit glassware and received test results of 2.5 and 7.2 µg when wiped at 0 hours, 15 µg at 24 hours, from 24 to 120 µg at 48 hours, and from 43 to 61 µg at 96 hours.

b. J.C. Penney's Cosmetic Products

Plaintiff purchased cosmetic kits products sold by J.C. Penney and tested *select* components of each for lead through a series of the EPA 3050B digests test described

above. (*See*, **Exhibit B**, attached, for a table of all test results.) Mr. Dougherty testified that these digest tests did not achieve a complete digestion of the sample. Mr. Dougherty testified that some of the sample remained undigested after the digest test was completed and, accordingly, did not reflect the concentration of actual lead in the sample. Plaintiff also did not test each component in the cosmetic kit.

On December 31, 2001, Plaintiff tested two components in Private Portfolio's Riviera Professional Holiday Blockbuster and received results totaling 2.97 µg of lead in the cosmetic kit: .47 µg in the lipstick and 2.5 µg in the eyeliner. On April 11, 2002, Plaintiff tested four (4) components in Private Portfolio's Riviera Professional Holiday Blockbuster and received results totaling 8.78 µg of lead in the cosmetic kit: .29 µg in the lipstick, 4.1 µg in the eye shadow, 4 µg in the eyeliner, and .39 µg in the blush.

On October 30, 2002, Plaintiff tested one component of lip color in the JCP Home Collection (IMS) Luxurious Traincase cosmetic kit and received results of .3 µg of lead.

On December 2, 2002, Plaintiff tested one component of lipstick from Elizabeth Arden's Elizabeth Taylor Holiday Collection and received results of 1.1 µg of lead.

On February 28, 2003, Plaintiff tested six components from Elizabeth Arden's Elizabeth Taylor Holiday Collection, which results totaled as much as 13.9 µg of lead for the two components in the cosmetic kit: 4.6 and 5.2 µg in blush powder, and 4.6 µg, 6 µg, 6.1 µg and 8.7 µg of lead in eye shadow. Also in this series of digests test, Plaintiff tested six components from Elizabeth Arden's Sheer Halston Holiday cosmetic kits and received results totaling as much as 13.9 µg of lead for the cosmetic kit: 1.2 to 1.4 µg in lipstick, 3.3 to 4.2 µg in powder shimmer, and 2.1 to 8.3 µg in eye shadow. In this series, Plaintiff also tested the lead content in lipstick from Intercon's Cool Bag and received results of .39 and .53 µg. Lastly, in this series of digest tests, Plaintiff tested four components in JCP Home Collection's (IMS) Luxurious Traincase with results totaling as much as 1.52 µg of lead, and as low as not detectable, including results of .39 and 1.2 µg of lead in lipstick/lip color and .32 µg of lead in eyeliner.

c. Macy's West Cosmetic Products

Plaintiff purchased cosmetic kits products sold by Macy's West and tested select components of each for lead through a series of EPA 3050B digest tests as described above. As with the tests on selected JC Penney cosmetic components, Mr. Dougherty testified that these digest tests did not achieve a complete digestion of the sample itself. Mr. Dougherty testified that some of the sample remained undigested after the test was completed and, accordingly, did not reflect the concentration of actual lead in the sample. Plaintiff also did not test each component in the cosmetic kit.

On April 11, 2002, Plaintiff tested one component of lipstick from Fashion Fair Glitter N' Go and received results of .2 µg of lead.

On January 2, 2003, Plaintiff tested four components from Fashion Fair Beauty On The Go II and received results totaling as much as 3.2 µg of lead: 0.4 to 0.6 µg in lipstick, 1.1 µg in powder shimmer and 1.5 µg in eye shadow.

On January 2, 2003 and January 9, 2003, Plaintiff tested four lipsticks from Fashion Fair Glitter N' Go and received results of .6 µg, .8 µg, 1.1 µg and 1.7 µg of lead respectively.

On January 15, 2003, Plaintiff tested lipstick in Christian Dior Esprit De Bruns cosmetic kit and received results of 1.2 µg of lead.

On February 28, 2003, Plaintiff tested three components from Christian Dior Esprit De Bruns cosmetic kit and received results totaling as much as 11.5 µg of lead: 7.8 µg in eyeliner pencil, and 2.1 and 2.5 µg in eye shadow. In this series of digest tests, Plaintiff also tested five components from Fashion Fair Glitter N' Go cosmetic kit and received results totaling as much as 4.8 µg of lead: 0.77 to 0.94 µg in powder shimmer, .81 µg in lipstick, and 3.0 and 3.1 µg in eye shadow.

B. Statement of Facts Concerning Defendants and Their Products

1. Defendants' Purchase of the Products and Agreements with the Vendors

At trial, witnesses for J.C. Penney and Macy's West testified as to the buying programs and vendor agreements in place for the purchase of cosmetics and, as to J.C. Penney, only painted glassware. Both Macy's West and J.C. Penney require the manufacturers/ vendors to ensure that their products comply with Proposition 65. While J.C. Penney and Macy's West did not produce every Trading Partner Agreement ("TPA") or purchase order for the vendors identified by Plaintiff at trial, Defendants did provide the relevant terms and conditions to which vendors were generally liable. As detailed more fully below, the buyers from J.C. Penney and Macy's West understood that all of the vendors agreed to the same terms and conditions in the TPA and purchase orders. In part in light of the vendor obligations inherent in the purchase agreements, but also because Plaintiff did not identify any products beyond those named in the 60-day notices, J.C. Penney and Macy's West admittedly never discontinued sales of the painted glassware and cosmetics they sold after receipt of Plaintiffs 60-Day Notices. Similarly, with respect to cosmetics and all of the painted glassware with the singular exception for J.C. Penney's Home Collection stripes pattern in the later periods and Home Essentials & Beyond in 2003 . . . ." (Brimer trial testimony, Ex.s 2-F, 2-P and 2-W.), Defendants did not provide Proposition 65 warnings to consumers regarding the presence of lead in the products.

a. Macy's West's Sale of Cosmetic Kits

Macy's West, Inc. is a wholly owned subsidiary of Federated Department Stores, Inc. The corporate headquarters are located in San Francisco, California. Macy's West operates approximately 80 stores in California. Macy's West corporate philosophy highly values consumer choice and aspires to have open and hones communication with their customers. (Exh. 191, p. 2.) Macy's West sells a vast array of products, including cosmetics manufactured by Fashion Fair, Christian Dior and Elizabeth Arden.

Elizabeth Morello ("Morello"), Senior Vice President and General Merchandise Manager for Fragrances and Cosmetics at Macy's West, testified regarding the purchase of cosmetic products by Macy's West. (Morello Trial Testimony 9/8/03.) Morello testified that nine buyers report to her through two Vice Presidents, Cindy Harper (Cosmetics) and Carye Campbell (Fragrances). The role of the buyer is to purchase products from the vendors and plan advertising, financial and promotional activities surrounding the products. Specifically, Ms. Morello and her buyers work in conjunction with Macy's West's own advertising department, and that of the vendor, to come up with the budgets, concepts and themes, secure approvals and make edits to any of the cosmetic advertising or store displays disseminated by Macy's West. (Morello Testimony, 10/6/03, Morello deposition at 67:20-21.) Morello testified that she is responsible for Sharon Pittman (Markwins products), Jill Barr (Fashion Fair), Maggie Rogers (Christian Dior) and additional buyers for Estee Lauder, Origins, Lancome, and Clinique. (Morello Trial Testimony 9/8/03.)

Morello testified that Macy's West carries tens of thousands of different cosmetic stock keeping units ("SKUs"). (Morello Trial Testimony 9/8/03.) Morello also testified that during key selling periods, every cosmetic brand would offer approximately three to four cosmetic "sets" for sale, which amounts to six to twelve "sets" a year for each of the 25 cosmetic vendors. In addition, each vendor might have approximately eight "gifts with purchases" ("GWPs") or "purchases with purchase" ("PWPs") offered as well. (Morello Trial Testimony 9/8/03.)

Morello understood that lead was listed as a toxic chemical by the State of California and believed that customers might want to be notified of the presence of lead in cosmetics. (Morello Testimony 09/08/03; Morello deposition at 87:20-22.) However, Morello did not know that lead was a component of any cosmetic product sold by Macy's West. (Morello testimony 10/06/03.) Morello testified that the cosmetic vendors are responsible for health and safety warnings. These requirements are set forth in the Purchase Order, which Morello believed is the same for all products and is used by all

Macy's West buyers, though Morello did not inspect every Purchase Order. (Morello Trial Testimony 9/8/03; Exhibit AA.) Pursuant to the Purchase Order, each vendor's products are required to comply with all applicable laws, and the vendor is specifically required to provide any required Proposition 65 warnings. Specifically, the terms and conditions state that "Vendor covenants, represents, warrants and guarantees that...A. it has and shall comply with all federal, state and local laws, ordinances and codes, together with all rules, regulations and guides promulgated thereunder or pursuant thereto...B. The Goods were manufactured and conveyed by Vendor in compliance with Applicable Law, including any that regulate or otherwise concern contents...and that neither Purchaser's acquisition nor sales thereof shall violate Applicable Law...C. The Goods shall comply and be accompanied by such materials for them and/or Purchaser to comply with Applicable Law...G. In the event and to the extent that this Purchase Order relates to Goods that may require a consumer warning under the California Law commonly known as 'Proposition 65', Vendor shall so advise Purchaser, in writing, before proceeding to accept or otherwise process the order. If Purchaser, after receipt of Vendor's written information concerning the applicability of Proposition 65, advises Vendor that it wishes to confirm the order and proceed, Vendor shall place warnings directly on such Goods as may be offered for sale by Purchaser in California that comply with California law, regardless of how such Goods are to be offered for sale, whether by mail, electronic media, or in retail outlets." (Exhibit AA.) Macy's West employees are trained on an annual basis regarding the Purchase Order rules and regulations. (Morello Trial Testimony 9/8/03.) Before receipt of the 60-Day Notice, Macy's West had no knowledge of lead in cosmetics. In fact, no evidence exists to indicate that Macy's West was aware of any lead in any product other than Markwins before receiving Fashion Fair test results in March, 2003, after Plaintiff identified a Fashion Fair product as containing lead. (Morello Trial Testimony 9/8/03.)

Jill Barr ("Barr"), cosmetics buyer at Macy's West for Fashion Fair products since 1998, testified that she reports to Cindy Harper, Divisional Merchandise Manager, who

reports to Morello. (Barr Trial Testimony 9/10/03.) Barr was responsible for the Fashion Fair line of cosmetics, a line marketed particularly to women of color. Barr and Macy's West provide input into the marketing and advertising of Fashion Fair products in that Barr was responsible for reviewing, selecting, and approving any advertising suggested by Fashion Fair. (Barr Trial Testimony 9/30/03.) Barr testified at trial that Fashion Fair makes proposals to Barr regarding the products for sale during specific seasons through a marketing book and Barr places an order based upon her knowledge of prior sales and other factors. (Barr Trial Testimony 9/10/03.) As Barr testified, Fashion Fair accounts for approximately 0.3% of total sales volume for cosmetics at Macy's West, generating annual revenue of approximately two million dollars. (Barr Trial Testimony 9/10/03.) Fashion Fair creates the advertising for its products and Barr reviews it. (Barr Trial Testimony 9/10/03.) Macy's West offered both the Fashion Fair Beauty on the Go II and the Fashion Fair Glitter N' Go II cosmetics kits for sale. (Barr Trial Testimony 9/10/03.) Barr testified that her training lead to her understanding that for each order, a Purchase Order is transmitted electronically to the vendor, which sets forth the terms and conditions. While Barr did not see the particular terms and conditions forwarded to the vendors, she understood that all vendors received substantially similar terms and conditions. (Barr Trial Testimony 9/10/03.)

Barr understood that lead was listed as a toxic chemical by the state of California, but she did not know lead was a component of any cosmetic product that Macy's West sold. (Barr Trial Testimony 9/10/03.) Macy's West does not have any employees responsible for compliance with Proposition 65 for products made by its vendors, and relies upon its counsel to work with the vendors to ensure that the products comply. (Barr Trial Testimony 9/10/03, Morello Trial Testimony 9/8/03).

b. J.C. Penney's Sale of Cosmetic Kits

There are over 1000 J.C. Penney department stores throughout the United States, with over one hundred stores in California. J.C. Penney Company is headquartered in Plano, Texas.

Among the many products sold by J.C. Penney are cosmetics. With respect to cosmetics, J.C. Penney maintains a "Cosmetic Testing Program" for private label and national brands. One requirement of the program is to maintain Material Safety Data Sheets ("MSDS") for the purpose of determining whether flammability labels are required for certain products. (Exhibit 100; Jones Trial Testimony 11/05/03.) J.C. Penney routinely maintains MSDS for potentially flammable cosmetic products such as nail polishes, but there was no testimony to support that J.C. Penney routinely maintained MSDS for any other cosmetic products. (Jones Trial Testimony 11/05/03.)

Christine Parker ("Parker"), senior buyer for cosmetics at J.C. Penney, testified regarding the sale of cosmetics at J.C. Penney stores. Parker testified that she started as an assistant buyer in women's accessories, a department which includes cosmetics, in 2000. (Parker Trial Testimony 10/20/03.) At that time, there were two buyers of cosmetics, Nancy Hillis and Darcy Hall. Parker was the assistant to Darcy Hall and had responsibility for color kits. (Parker Trial Testimony 10/20/03.) Parker testified that there are four selling seasons, each with a start sale date and an out of stock date by which the stores strive to have all of the product sold. The holiday season typically ran from September through February of the next year. (Parker Trial Testimony 10/20/03.) Parker testified that before mid-2003, all J.C. Penney stores were to use discounting means to ensure that the least amount of stock remained for seasonal cosmetic items. As such, J.C. Penney would implement deep discounts for any remaining stock with the goal of having all items removed from inventory by way of customer sale. (Parker Trial Testimony 10/20/03.)

Parker testified that J.C. Penney sold the Markwins Wings of Beauty kit, the Private Portfolio/Riviera Professionals Blockbuster cosmetic kit, the IMS Cool Bag, the Sheer Halston cosmetic kit the Luxurious Traincase, and Elizabeth Taylor's Passion kit. (Parker Trial Testimony 10/20/03.) J.C. Penney also produced documents that indicated that J.C. Penney sold other cosmetic kits by other vendors, such as Fashion Fair, IMS, Color Me Beautiful, Iman, Flori Roberts and Galisa Overseas. (Exhibit 100.) Parker

testified that the term "blockbuster" is typically used in the industry to describe the cosmetic kits at issue in this case. She further explained that a blockbuster is a collection of makeup sold together in a boxed form, often with some type of carrying case. (Parker Trial Testimony 10/20/03) Parker testified that her general understanding was that individual cosmetic products which need to be replenished quickly are manufactured domestically; whereas seasonal cosmetic kits, which are ordered significantly in advance for a one-to two time shipment, are manufactured in the Far East to reduce labor costs. (Parker Trial Testimony 10/22/03) Parker testified that, as part of her duties as a buyer of cosmetics, she reviewed advertising. (Parker Trial Testimony 10/20/03)

Parker testified that the Trading Partner Agreement ("TPA") signed by the vendors requires that all vendors comply with all laws. The TPA must be signed before any supplier can do business with J.C. Penney. As Parker testified, the TPA standardizes expectations. (Parker Trial Testimony 10/20/03; Trial Exhibit 7Fs.) Parker testified that the TPA is the same form used for all vendors, of which there are approximately 3000 at any given time, throughout J.C. Penney, including cosmetic vendors. (Parker Trial Testimony 10/20/03.) As part of her training in 1999, Parker reviewed the TPA requirements and learned that the buyer is responsible for completing the TPA form with the new vendor. Parker believed that TPA has been available electronically on the J.C. Penney website since 2002, but a hard copy could always be obtained from any department or the records department in Salt Lake City, as it is a standard form. (Parker Trial Testimony 10/20/03) Specifically, the TPA fully incorporates J.C. Penney's Purchase Order language, which states: "Seller represents and warrants to Penney, in addition to all warranties implied by law, that each item of merchandise described on the face hereof, whether produced in whole or in part by Seller or a third party, together with all related packaging, labeling and other printed matter and all related advertisements furnished or authorized by Seller ("Merchandise") shall (a) be free from defects in design, workmanship or materials including, without limitation, such defects as could cause personal injury or create a hazard to life or damage to property; (b) be fit for its particular

purpose and be suitable for use, be manufactured, be packaged for shipment, be properly labeled, including marked with the country of origin, where applicable, and be registered as required, all in accordance with and under all applicable laws, ordinances, regulations, rulings, orders, decrees, resolutions, norms, standards, requirements, policies, or directives of any governmental authority of or within the United States of America." As Parker testified, the TPA standardizes expectations and obligations of both parties. (Parker Trial Testimony 10/20/03; Trial Exhibit 7Fs.) Parker understood that even with the vendor responsibilities in the TPA, J.C. Penney was still obligated to follow State and Federal law. (Parker Trial Testimony 10/22/03.)

Parker testified that in October of 2000, she received and read Plaintiff's 60-day notice, which specifically mentioned the Markwins Wings of Beauty product. Thereafter, she contacted a Markwins representative. The Markwins representative, Tom Wood, was surprised and advised Parker that he thought the matter had been taken care of previously. Parker asked Mr. Wood if J.C. Penney was in violation of the statute set forth in the 60 day notice and if anything needed to be taken care of by J.C. Penney and Mr. Wood stated "no." Mr. Wood never mentioned lead in cosmetics and Parker believed that there was no lead in cosmetics. Parker also reviewed the ingredient list for the Markwins Wings of Beauty product, which did not indicate the product contained lead, and asked around the office regarding knowledge of lead in cosmetics. No other cosmetic employees or vendor representatives indicated that they had knowledge of lead in cosmetics. (Parker Trial Testimony 10/20/03). Parker performed no further investigation into the allegation of lead in cosmetics.

It was not until trial that Parker learned the names of the specific cosmetic kits involved in the case other than the Markwins Wings of Beauty kit set forth in Plaintiff's 60 day notice. (Parker Trial Testimony 10/20/03) There is no evidence of J.C. Penney's knowledge of lead in any cosmetics before receipt of the 60-Day Notice. Further, there is no evidence of J.C. Penney's knowledge of lead in any cosmetics other than the lead test results produced by Plaintiff in discovery in March, 2003.

Catherine Bokar was the J.C. Penney buyer for Riviera/Private Portfolio cosmetics. Bokar was involved with the vendor in designing and approving advertisements and marketing plans. (Bokar deposition at 38:10-39:2). Bokar did not contact the vendor to determine whether the Riviera/Private Portfolio cosmetics contained any lead. (Bokar deposition at 31:12-32:16).

The J.C. Penney Retail Testing Laboratory ("RTL") located in Texas performs product testing. It did not test for lead in cosmetics sold by J.C. Penney. (Owen Jones Trial Testimony, 11/5/03.) Parker testified that the cosmetic supplier is responsible for submitting an ingredient list and microbial report, wherein the RTL verifies the spelling of the ingredients. (Parker Trial Testimony 10/20/03) Parker testified that the RTL never supplied any information to indicate that cosmetics contained lead. (Parker Trial Testimony 10/20/03) Upon request, the RTL informed Parker that they did not test cosmetics for the presence of lead. (Parker Trial Testimony 10/21/03).

c. J.C. Penney Sale of Painted Glassware

Richard Brinkman ("Brinkman"), former senior buyer in the tabletop division at J.C. Penney until January of 2003, testified at trial that he was responsible for sales and profit, development of products, marketing and negotiation with vendors for all tabletop lines, including painted glassware. The tabletop division includes dinnerware, informal and formal glassware, crystal, linens, utensils, and painted glassware. (Brinkman Trial Testimony 9/16/03.) As senior buyer, Brinkman oversaw four assistant buyers, two secretaries and two distribution coordinators. (Brinkman Trial Testimony 9/16/03.) Brinkman was located at the J.C. Penney headquarters in Texas.

Brinkman testified that it was the responsibility of vendors to notify J.C. Penney which products required a Proposition 65 warning. (Brinkman Trial Testimony 9/16/03.) The TPA signed by the vendors required that all vendors test their products and comply with all laws. (Brinkman Trial Testimony 9/16/03; Exhibit 4Bs.) Although he never saw a TPA signed by a vendor at issue, Brinkman believed that all of the suppliers at issue had

signed the TPA because he understood that all J.C. Penney vendors were required to sign the same TPA.

Testimony established that J.C. Penney determined that certain vendors were exempt from testing at the Research Testing Laboratory ("RTL") and all other vendors were not exempt from such testing. There was a list for such exempt vendors. "Exempt" National Brand suppliers are relieved from J.C. Penney QC inspections and RTL testing (except as directed by RTL). Those suppliers identified as "exempt" are typically long-standing J.C. Penney suppliers with favorable quality control history that produce their own (national brand) products. The "Exempt List" does not impose any additional obligations on the part of J.C. Penney nor does it specify any obligations with regard to suppliers and/or brands that are not listed.

Judy Strother ("Strother"), assistant buyer to Brinkman in the tabletop division at J.C. Penney in Plano, Texas, testified at trial that she assisted Brinkman in purchasing tabletop products for J.C. Penney, including painted glassware. (Strother Trial Testimony 9/11/03.) At the direction of Brinkman, Strother collected data from Brinkman and her buying team in order to identify each product that would be placed in the catalog and/or retail merchandise assortment plans. Strother created product listings for each retail season, and each catalog, and systematically communicated these listings to all glassware vendors, asking them to identify for J.C. Penney which of their products require a Proposition 65 warning label. (Strother Trial Testimony 9/11/03.) After obtaining the list of suppliers and products from Brinkman, Strother sent the list of products to the suppliers and asked them to advise as to which products required Proposition 65 warnings. Strother testified that the vendors were responsible for notifying J.C. Penney of any products that required a Proposition 65 warning. (Strother Trial Testimony 9/11/03.) No vendor of painted glassware identified a product that required a Proposition 65 warning. J.C. Penney did not itself attempt to determine whether tabletop products complied with Proposition 65. (Strother Trial Testimony 9/11/03; Brinkman Trial Testimony 10/3/03.) In the rare case that J.C. Penney did not receive any affirmative declaration from vendors

as to Proposition 65 compliance, Strother testified that J.C. Penney would require a warning if there was any doubt. (Strother Trial Testimony). However, in March of 1998, J.C. Penney requested Certified International confirm its ceramic ware products complied with Proposition 65. Despite receiving no response indicating compliance with glassware products, J.C. Penney never warned for these products. (Ex. DD.)

Brinkman testified that, in the past, J.C. Penney tested all tabletop products at the J.C. Penney lab even though the suppliers were also testing their own products. J.C. Penney's RTL laboratory performed testing to determine product compliance, for all consumer safety purposes, on all decorated glassware products supplied by Home Essentials & Beyond, Gibson, Certified, Granco, and Block/Salton. (Ex. 5-K, Jones testimony, Brinkman testimony.) After the development of the TPA in approximately 1996/1997, J.C. Penney generally tested only non-exempt supplier products. Those national brand suppliers that were placed on the exempt list guaranteed that their products complied with all laws and regulations through the TPA and J.C. Penney did not independently test those products. (Brinkman Trial Testimony 9/16/03) Suppliers were placed on the exempt list after they had proven themselves to be a reliable supplier without quality problems. (Brinkman Trial Testimony 10/03/03.)

Brinkman became aware of Proposition 65 in approximately 1992/1993 as a result of a consent judgment involving leaded crystal and food use ceramic products. In response to the consent judgment, Brinkman contacted suppliers to find out which products required Proposition 65 warnings, made Proposition 65 triangles and signs for the stores and advised the California stores regarding the action to be taken with respect to the warnings for those products identified by the suppliers. (Brinkman Trial Testimony 9/16/03 and Defendants' Trial Exhibit WWW) Thereafter, Brinkman and the tabletop division obtained information from the suppliers regarding Proposition 65 warnings and informed the stores accordingly every six months. (Brinkman Trial Testimony 9/17/03)

With regard to painted decoration on the outside of glassware, Brinkman understood that industry standards and FDA required that lead paint not be within the top

20 millimeter (mm) of glassware (the lip and rim area), and testified that he required the vendors of painted glassware to keep the paint out of the lip and rim area. (Brinkman Trial Testimony 9/16/03.) After receipt of the 60-Day Notice, Brinkman testified that he instructed all vendors that if the lip and rim was clean, but there was a question of lead in the paint below the 20 mm area, then a Proposition 65 warning must be placed on the product. (Brinkman Trial Testimony 9/16/03). While Brinkman believed that painted glassware complied with Proposition 65 if the paint was not within 20 mm of the lip and rim, he instructed vendors to apply a Proposition 65 warning if the paint contained lead regardless of the lip and rim requirements. (Brinkman Trial Testimony 10/3/03.) Brinkman believed that the firing of the glassware in a kiln reduced the lead and sealed the paint, and did not understand that a user could be exposed to lead by handling a non-food contact surface. (Brinkman Trial Testimony 10/3/03.) Brinkman was not aware of any Proposition 65 'standard' for ceramic ware or crystal, but he was aware of the testing levels created through a lawsuit against the manufacturers of those products. Proposition 65 does not set standards for consumer products other than the safe harbor levels above which no exposure can occur without a clear and reasonable warning. There never were, nor are there now any actual 'standards' set by Proposition 65 for lead exposure from crystal or ceramic ware other than the .5µg MADL. Accordingly, Brinkman was not aware of any specific 'standards' set by Proposition 65 for crystal ceramic ware or painted glassware. However, Brinkman was aware that Proposition 65 requirements for California sales of leaded crystal and ceramic ware were generally more strict than the relevant FDA levels for national sales of those products. (Brinkman Trial Testimony 9/16/03 and 10/3/03). Brinkman was not aware of any California or FDA requirements that applied to non-food contact surfaces.

J.C. Penney began selling painted glassware in 1995 with the sale of PGM Romania painted glasses (Brinkman Trial Testimony 9/16/03 and 10/03/03.) Mr. Brinkman's experience with painted glassware began with the PGM Romania hand painted glassware in 1995. (Brinkman Trial Testimony 9/17/03). Because Mr. Brinkman

was concerned about leaded crystal, he specifically inquired about any lead in the Romania glassware paint. (Brinkman Trial Testimony 9/17/03). At the time of the 1995 product development, he specifically confirmed with the vendor that all Romania painted glassware was lead free. (Brinkman Trial Testimony 9/17/03).

In October 2001, Brinkman was developing a new glassware product with a vendor named Syratech. (Brinkman Trial Testimony 10/3/03.) Owen Jones, Product Safety Coordinator for RTL, testified at trial that Kasey Wise, an evaluator at RTL, first tested the Syratech painted glassware in October of 2001 utilizing the incorrectly applied 16 C.F.R. §1303 chip test. (Jones Trial Testimony 11/5/03; Exhibit 52.) Mr. Wise was formerly responsible for testing toys, where the chip test was utilized for painted surfaces that could be scraped off. (Jones Trial Testimony 11/5/03.) The chip testing revealed that there was lead in the paint. (Exhibit 52.) Wise concluded that the lead in the paint exceeded the limits of the CPSC's regulations. (Exhibit 52.) Brinkman testified that he cancelled the order due to Syratech's failure to keep the paint out of the lip and rim. (Brinkman Trial Testimony 10/3/03.) An email dated October 19, 2001, from C. Wise to Brinkman provides as follows: "...there are requirements for decorative glassware with painted surfaces within the 20 mm in which the Lip and Rim would be tested for leachable lead. However, 16 CFR 1303 is for painted surfaces in which consumers have direct access to the painted surface in which your glassware has. The paint used contains lead levels exceeding that limit extensively. Therefore, it should be considered a banned hazardous product as a result of high lead. As you know the government knows that lead has to be used to gain color properties, bond/adhesion characteristics and among other things. They ask that the lead be controlled and that consumers are not put at risk of high lead poisoning." An email dated October 19, 2001, from Brinkman to Alan Kanter of Syratech states as follows: "The JCPenney Company will not allow knowingly that we expose our customer to lethal materials. The law does allow 20 mm from the top on decorative glass however Kasey Wise has spelt out the legal issues with drinkware verses decorative glass. I am sorry, our position will be the orders are canceled. Product does

not meet JCPenney testing no legal compliance." Brinkman replaced Syratech with Home Essentials in order to provide the painted glassware product he wanted. (Brinkman Trial Testimony 10/3/03.) Jones, who had the authority to determine the appropriate testing to be used at RTL, was provided a copy of the emails discussing the testing, but not involved because the product was not actually sold. (Jones Trial Testimony 11/5/03.)

In December of 2001, Brinkman received a copy of Plaintiff's 60-day notice regarding painted glassware. (Brinkman Trial Testimony 9/16/03.) In January and February 2002, Wise tested the Home Essentials Floral glassware, again utilizing the 1303 chip test and several lip and rim tests. The tests revealed paint within the top 20 mm of the glass. (Exhibits 53, 54, 56, 57, 63, 65, 66, 166.) Jones was then brought in to resolve potential product safety issues. (Jones Trial Testimony 11/5/03.) After investigation by Jones and others at RTL, and in accordance with guidance from the Society of Glassware and Ceramic Decorators ("SGCD"), J.C. Penney determined that the lip and rim test was the correct test for such glassware and that the 1303 chip test was not applicable to painted glassware. (Jones Trial Testimony 11/5/03; Exhibits 50, 4As.) Jones consulted with Brinkman, and verified that the Home Essentials products were not yet in the stores, and concluded that the lip and rim testing performed before February 15, 2002 was not performed on actual production glasses, but rather on pre-production samples from the buyers' sample room. (Jones Trial Testimony 11/15/03; Exhibit 54.) Home Essentials production glassware found at the Vista Ridge store on February 15, 2002 passed the lip and rim test and on February 11, Home Essentials assured J.C. Penney that it will keep paint out of the lip and rim area. (Jones Trial Testimony 11/5/03; Brinkman Trial Testimony 9/16/03; Exhibits 50, 4As, 7Ls.)

The J.C. Penney Lemon Iced Tea and Stripe products passed the lip and rim tests prior to sale. (Exhibit 100, pages 1226 and 1212.) Certified International Flora and Sunrise painted glassware also passed the lip and rim test prior to sale. (Exhibit 7C's. Exhibit 100, pp. 1229 and 1236-37.) Gibson painted glassware initially failed the lip and rim test, but were reworked so that the products complied with the lip and rim test prior to

sale. (Soleiman Gabay Testimony, Exhibit 100, p. 1233.) There was no evidence of testing of any other glassware products produced by J.C. Penney.

The TPA signed by the vendors required that all vendors test their products and comply with all laws. (Brinkman Trial Testimony 9/16/03; Exhibit 4Bs.) Brinkman understood that all J.C. Penney vendors were required to sign the same TPA. In 2002, Brinkman testified that as a proactive measure and in response to Plaintiff's 60-day notice, he also advised the suppliers of painted glassware, specifically Home Essentials, Salton and Gibson, to place Proposition 65 warning labels on the boxes as well as keeping the paint out of the lip and rim area. (Brinkman Trial Testimony 9/25/03 and 10/03/03). Mr. Brinkman did not verify whether Gibson, Block/Salton or Home Essentials did put Proposition 65 warning triangles on the boxes containing painted glassware products per his advice. (Brinkman Trial Testimony 09/25/03). To the best of Mr. Brinkman's knowledge, Home Essentials placed warnings on the boxes from the time of first sale to the present (Brinkman Deposition at 105:15-20; Exhibit 26.)

IV. DESCRIPTION OF EXPERT TESTIMONY

A. Plaintiff's Experts

1. Lead as a Listed Chemical

Lead, due primarily to its prevalence in our society from man-made products, is one of the mostly highly studied toxicants in the world. "Lead" was officially listed as a chemical known to the State of California to cause reproductive harm on February 27, 1987. "Lead" was expressly identified as causing developmental reproductive toxicity in both males and females. Proposition 65 does not identify any Chemical Abstracts Service ("CAS") number for "Lead". Proposition 65's chemicals list expressly identifies that "no CAS number is given when several substances are presented as a single listing."

All experts, including those of Defendants, agree that lead – in any amount – serves absolutely no beneficial purpose for the human body. All of the experts further agree that lead is a reproductive toxicant that causes birth defects and other reproductive harm.

2. No Safe Level

Dr. Callahan and Dr. Brown testified that there is no known level of human exposure to lead that is safe and free from risk of reproductive or other toxicity. The Court took judicial notice of documents that relate to this opinion. The FDA specifically states that there are "no levels of lead exposure for children or adults at which it may be considered that no adverse effect occurs." (*See*, Trial Ex. F, p. 19.) Similarly, "safe levels of lead exposure have not been identified." (*See*, Trial Ex. F, p. 22.) California's EPA, through the California Lead Spread exposure model, also specifically cautions that, "a clear no-observed-effect concentration has not been established for such Pb-related endpoints as birth weight, gestation period, heme synthesis, neurobehavioral development in children and fetuses..." (Trial Ex. 151.)

Both Drs. Callahan and Brown testified at length about the historical and current pattern of science and medicine to identify continuously lower levels of exposure to lead at which it is known that lead is unsafe. (Callahan Test. 12:3-5.) Both Drs. Callahan and Brown testified that it was their understanding that the most advanced and most current research suggests that the most significant human IQ decrements caused from lead exposure seem to occur below 10µg/dL - a level previously identified by the Centers For Disease Control ("CDC") as a National "level of concern", but still not considered by the CDC as a safe level of exposure. (*See*, Callahan Test. 8/12-8/13, 12:10-13:6, 14:9-15:9.) Dr. Callahan testified abut attending a conference recently at which a topic of discussion was CDC's intent to change the "level of concern" for lead. Dr. Callahan testified that her understanding of this conference topic was that, because of the ever growing body of medical and scientific evidence regarding adverse health effects from lower levels of lead exposure, the CDC is currently attempting to identify yet another, lower blood lead level as the "level of concern" for significant adverse health effects from lead exposure. (Callahan Trial Test., 181).

All experts, including Defendants' toxicologists identified that humans are exposed unwittingly to lead through many environmental and other sources beyond their control.

Lead is found in drinking water and in the air from prior industrial discharges. Humans are further exposed to lead from animal food products, such as fish, that bioaccumulate lead in their flesh from independent air, water and soil contaminations. As all experts discussed, lead from all of these sources is accumulated and stored not only in the blood, but also in the bone and soft tissue of humans. Lead is released from these areas, back into the human bloodstream, in response to many human factors, especially pregnancy. As with most any health effect, humans all have individual and different susceptibilities to the harm caused by exposure to lead.

3. NOEL vs. LOEL

Toxicology is designed to perform risk assessments by exposing either animal or human subjects to various doses of chemical in an attempt to discover both the dose at which adverse effects are observed and that level at which they are not observed (regardless of whether it is safe or not). By conducting and analyzing continuously refined studies, toxicologists endeavor to identify one or both of two particularly major exposure levels of significance — the NOEL and/or LOEL. The highest level of an exposure at which no adverse health effects are observed is the "no observed effect level" or "NOEL" and the lowest level of exposure at which actual adverse effects are observed is the "lowest observed effect level" or the "LOEL". Proposition 65 utilizes these levels, adjusted with safety factors, to identify the daily (or other) human exposure to a chemical, if any, that is acceptable under the statutory consumer warning scheme. Under Proposition 65, such maximum allowable daily exposure level, or "MADL", is either 1,000 times less than the NOEL or 10,000 times less than the LOEL.[12]

[12] Under Proposition 65, if only the LOEL is known, then it is to be divided by ten (10) to obtain a functional equivalent NOEL.

4. Exposure

a. Dr. Brown

Dr. Brown was provided with photographs and samples of all the glassware products at issue, as well as the test results of leach and wipe testing performed on a variety of examples of such glassware. (*See*, Brown Test. 8/7.) Dr. Brown used principles of exposure assessment, the laboratory results of C&T, and several complete exposure pathways to come to the opinion that a reasonable consumer of the J.C. Penney painted glassware would suffer a significant oral exposure to lead from his or her reasonable use of such glassware. (*See*, Trial Ex. 1014, 156:12-25.)

Dr. Brown is a public health toxicologist and health researcher. (*See*, Brown Test. 8/7.) Dr. Brown has extensive professional experience as a toxicologist, specializing in heavy metals, for industry (Stauffer Chemical, American Cyanamid), teaching graduate students (Northeastern University) and running State (Connecticut Environmental Epidemiology and Occupational Health division) as well as Federal (Agency For Toxic Substance Disease Registry) toxicity evaluation and characterization programs. (*See*, Brown Test. 8/7.) Dr. Brown has researched, published and is considered an expert on the effect of heavy metals on the nervous and other human systems. (*See*, Brown Test. 8/7.) In fact, while with the State of Connecticut, Dr. Brown was routinely consulted by the CPSC for guidance on health risk and evaluation of consumer products containing lead.

To identify consumer exposures to lead from Defendant's painted glassware, Dr. Brown analyzed the presence of available lead on the glassware surface and completed an exposure pathway from the glassware surface to the consumer. Dr. Brown relied on both the NIOSH 9100 and ASTM C927 tests to demonstrate the availability of lead for exposure on the glassware, and then traced the pathway of the transfer of that lead from the glass to the consumer during product use. (*See*, Trial Ex. 1014, 157:1-11, 18-23 and 165:3-11.) Dr. Brown expressed the opinion that such lead comes from the pigments of the paints on the glass. (*See*, Trial Ex. 1014, 175:5-8.) Dr. Brown looked at exposure to lead as the lead that came through the mouth during ingestion. (*See*, Brown Test. 8/7.)

Dr. Brown did not look at exposure as the entry of lead into the blood. (*See*, Brown Test. 8/7.)

Dr. Brown testified that it was his opinion that the C927 test demonstrated the "availability on the article of lead for exposure". (Ex. 1014, 157:9-12.) Dr. Brown opined that, based upon his own testing, the normal principles of repeated collection of minute, acidic condensation on the glass surface were replicating the mild acid leach of C927 during normal use. (*See*, Brown Test. 8/7.) Dr. Brown further opined that this minute condensation – or "monolayer" of water - formed as the room, in which a glass is present, heats and cools. The monolayer of water then absorbs carbon dioxide and becomes acidic. (*See*, Brown Test. 8/7; *see also*, Trial Ex. 1014, 182:6-23.) Dr. Brown opined that, as the moisture evaporated, the acid concentration increased on the glassware surface and caused an increase in the amount of lead freed from the painted glass surface. (Trial Ex. 1014, 184:9-17). Dr. Brown has specifically and scientifically confirmed this principle of lead leach by minute condensation. (*See*, Trial Ex. 1014, 182:24-183:9, 184:18-185:1).

Once lead has leached to the surface of the glassware, Dr. Brown opined that exposure then results from direct lip or tongue contact, beverage collection and contact with the lead and then direct consumer lip/tongue contact with contaminated beverage. Though Dr. Brown agrees that the simple contact of a consumer's lips to the painted decoration will not cause the same amount of lead leach as the C927 immersion, he stated that the inevitable continuous condensation process will allow the lip and other body surfaces to contact similar – and perhaps greater – amounts of available lead as leached by the C927 process. (*See*, Brown Test. 8/7; *see also*, Trial Ex. 1014, 161:5-163:5 and 181:19-182:1). Dr. Brown gave the opinion that a significant amount of exposure could further result from repeated handling of the leaded surface and subsequent hand-to-mouth activity during the natural dining process (whether directly or through hand contact with other items, such as food, which items are subsequently ingested or brought into direct contact with the lip or tongue). (Trial Ex. 1014, 163:17-164:9.)

Dr. Brown similarly confirmed the NIOSH 9100 wipe test is adopted to and does demonstrate "the fact that there is lead on the surface" of the glasses tested. (Trial Ex. 1014, 172:17-173:4, 173:16-17.) Further, the 9100 test is semi-quantitative insofar as it identifies an actual amount of lead per surface wiped. (Trial Ex. 1014, 175:13-25.) Dr. Brown opined that since the foreseeable use of glassware involves repeated incidents of contact with the surface lead and transfer of that lead from the glass directly to the mouth as well as indirectly to the mouth through the significant hand to mouth activity experienced by adults, that the exposure pathway was completed in a similar manner as with the lead from the C927 test. (Trial Ex. 1014, 173:10-22.) Dr. Brown opined that a single wipe test of the glassware under NIOSH 9100 is equivalent to one human exposure from a single handling of a glass. The CPSC specifically uses the same technique and assumes that, "[o]ne stroke of the filter paper being equivalent to 1 stroke by a child's hand." (Trial Ex. 135, p. 10.) This correlation was used by the CPSC in their studies on both children's toys and playground equipment. Dr. Brown opined that the actual glassware exposure is much higher than any wipe result because of the multiple times an individual handles a glass during the course of a party or meal or regular day. Dr. Brown, also referencing the CPSC, opined that an adult hand-to-mouth transfer factor of lead from decorated glassware during a single episode of drinking one beverage from the glass would be in the range of 50% of a single wipe test result (Brown Depo., 203, 204). Dr. Brown referenced the CPSC report on lead exposures from PVC and the fact that the CPSC used, as a "conservative assumption", a 50% hand-to-mouth transfer factor for dislodgeable lead. (Brown Test. 7/2/03, 96:20-97:1, 98:15-20). Dr. Brown further opined that a consumer's direct exposure from the lip and rim area equaled one percent (1%) of the total lead leached by the C927 immersion test. (Brown Depo., 202-203).

Dr. Brown opined that, "if one is attempting to demonstrate exposure to lead by ingestion", that one could test the blood, bile or feces to demonstrate the exposure by the presence of lead in those substances. (Brown Depo., 152:18-19, 152, 153).